

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Revision of Part 22 of the  
Commission's Rules Governing  
the Public Mobile Services

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CC Docket No. 92-115

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C-TWO-PLUS TECHNOLOGY, INC.  
COMMENTS ON MOTION FOR ACCEPTANCE OF RESPONSE

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### Summary

TIA's unauthorized "Response to Replies and Comments on Joint Reply" ("TIA Response") confirms that the Commission must reconsider and vacate the adverse findings against C2+ in its Report and Order in this proceeding. Contrary to TIA's assertions, C2+ does not contend that ESN transfers performed by TIA members (or by C2+) during "repair and upgrade activities" violated the Commission's previous ESN restrictions." TIA Response at ¶7. In seeking reconsideration, C2+ has argued only that there is no reasonable basis for the Commission's implicit conclusion in Paragraph 62 of the Report and Order that use of a replacement phone with an ESN transferred by a TIA member during "repair and upgrade activities" is permissible, but use of the same phone "constitutes a violation of the Act and our rules" if the ESN was transferred by C2+ during similar "repair and upgrade activities."

TIA now claims that the Commission's "previous ESN restrictions" prohibited only "the duplication" of ESNs performed by C2+ in providing extension phones for cellular customers, and not "the authorized transfers of ESNs in connection with legitimate repairs and upgrade activities." TIA Response at ¶7 (emphasis in original). However, the Commission recognized no such distinction in Paragraph 62 of its Report and Order. In addition, TIA argues that ESN duplication "would seem inconsistent" with the Compatibility Specification because it interprets Paragraph 2.3.2 to require "that ESNs be 'uniquely assigned' to individual telephones."

TIA Response at ¶7. However, this interpretation: (a) is inconsistent with the express language of Paragraph 2.3.2; (b) is not required to achieve the basic purpose of the ESN as recognized by the Commission and TIA; (c) was previously suggested by CTIA in this proceeding appears to have been rejected by the Commission; and (d) would apply, if at all, only to manufacturers in connection with the type-acceptance process and not to ESN transfers after customer purchase of the mobile unit.

In any event, C2+ gives its extension phone customers the same instruction that the carriers offering "two phones/one number" services give to their customers: only one phone may be used at a time because otherwise the service may not function properly. When those instructions are followed, the subscriber has only one phone "in service" at a given time, and that phone "uniquely identifies" itself to the system so that all calls made to and from the phone are "properly billed" to the subscriber.

Finally, C2+ agrees that the Commission should expedite its reconsideration, but firmly believes that the Commission must redirect its anti-fraud efforts if they are to be successful. The record clearly demonstrates that it is too late to pursue a policy based on limiting access to ESN-transferring software and devices. Instead, the Commission should require users of such software and devices to register themselves and their customers with the carriers and permit immediate termination and prosecution of unregistered users and customers.

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COMMENTS ON MOTION FOR ACCEPTANCE OF RESPONSE

C-Two-Plus Technology, Inc. ("C2+") submits these comments on the "Motion for Acceptance of Response" filed by the Mobile and Personal Communications Division of the Telecommunications Industry Association ("TIA") on April 19, 1995 ("TIA Motion"). Despite its mischaracterization of certain arguments previously made by C2+ in this proceeding, TIA's unauthorized "Response to Replies and Comments to Joint Reply" ("TIA Response") confirms that the Commission must reconsider and vacate the adverse findings against C2+ contained in Paragraph 62 of the Report and Order. Consequently, in order to "assist...in resolving issues" in this proceeding (TIA Motion at 1), C2+ respectfully suggests that if the Commission grants the TIA Motion or otherwise considers TIA's Response, it should consider these comments as well.

### Preliminary Statement

In its Report and Order in this proceeding the Commission concluded that: (a) "cellular telephones with altered ESNs [Electronic Serial Numbers] do not comply with the cellular system compatibility specification;" (b) "knowing use of such altered equipment would violate our rules;" and (c) "any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules." Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 9 FCC Rcd. 6513 (1994) ("Report and Order"), at ¶62 (emphasis added). Despite substantial record evidence that manufacturers of cellular telephones, their service centers and other "third parties" routinely have transferred ESNs from defective phones to replacement phones for years -- thereby causing the replacement phone "to transmit an ESN other than the one originally installed by the manufacturer" -- the Commission made no mention of these phones in Paragraph 62 of its Report and Order. Instead, the Commission "advise[d] all cellular licensees and subscribers" only that "the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules." Id. at ¶62 (emphasis added).

In its Response, TIA attempts to account for and preserve this double standard by distinguishing between ESN "removals or transfers" performed by its members during

repairs and service upgrades and ESN "duplication" performed by C2+. TIA Response at ¶¶5-7. TIA then mistakenly claims that C2+ has implied that the ESN transfers performed by TIA members during "repair and upgrade activities violated the Commission's previous ESN restrictions." Id. at ¶7. To the contrary, C2+ has argued that the Commission must reconsider the adverse findings against C2+ in Paragraph 62 of the Report and Order because: (a) the ESN transfers performed by TIA members (and C2+) in the course of repairs and service upgrades do not violate "the Commission's previous ESN restrictions;" and (b) there is no basis under the Commission's prior rules for the distinction which TIA attempts to draw between those ESN transfers and the ESN emulations performed by C2+ to provide "extension" phones for bona fide cellular customers.

I. TIA's Response Confirms That Paragraph 62 Of The Report And Order Must Be Reconsidered.

In its Response, TIA attempts to distinguish between C2+'s "ESN duplication activities" and the "ESN temporary removals or transfers performed by TIA members in normal repair and upgrade activities."<sup>1</sup> TIA Response at ¶6 (emphasis

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<sup>1</sup> TIA now claims that its members transfer ESNs from one phone to another in "rare cases" where a defective phone cannot be repaired quickly. TIA Response at ¶¶5-7. TIA fails to mention that those ESN transfer activities have been going on for years with the approval of cellular carriers and the Cellular Telecommunications Industry Association ("CTIA"). See Motorola Reply Comments, filed Nov. 5, 1992, at 2-3 (ESN transfer "program" for repairs has been "positively accepted by a number of cellular service providers" and permitted under "the equipment certification program currently operated by

in original). Specifically, TIA contends that "[i]t was the duplication activity, not the authorized transfers of ESNs in connection with legitimate repairs and upgrade activities, that is the basis for most cellular fraud and was therefore prohibited in the Compatibility Specifications and the Commission's Rules." Id. at ¶7. Although C2+ provides repair and upgrade services involving ESN transfers and manipulation similar to the services provided by TIA's members (see C2+ Petition for Reconsideration, filed Dec. 19, 1994 ("C2+ Petition for Reconsideration"), at 6 and Exhibit 1 at ¶1), the Commission did not draw the distinction described by TIA when it concluded that use of C2+ phones "constitutes a violation of the Act and our rules." Report and Order at ¶62.

However, contrary to TIA's assertions, C2+ did not imply "that TIA members' repair and upgrade activities violated the Commission's previous ESN restrictions." TIA Response at ¶7. Instead, C2+ argued only that the Commission must reconsider and vacate the conclusions against C2+ in Paragraph 62 of the Report and Order because -- unless TIA

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CTIA."). Moreover, TIA previously described the incidence of ESN transfers during repair procedures as anything but "rare." See TIA Petition for Clarification and Reconsideration, filed Dec. 19, 1994, at ¶12 (the cost of shipping phones back to the factory for ESN transfer, assuming "\$3.00-\$5.00 per unit," would be "many millions of dollars when the average number of repaired or upgraded units are considered." (emphasis in original)). Thus, the record clearly establishes that there are countless phones which have been programmed by TIA members "to cause them to transmit an ESN other than the one originally installed" in those phones.



membership confers some special regulatory status on a party -- there simply is no basis for the Commission's implicit conclusion that use of a replacement phone with an ESN transferred by a TIA member during "repair and upgrade activities" would be permissible, but use of the same phone would constitute "a violation the Act and our rules" if C2+ transferred the ESN during similar "repair and upgrade activities."

Thus, TIA's Response confirms at least three fundamental arguments that C2+ has advanced throughout this proceeding:

- (1) There are legitimate, non-fraudulent reasons to transfer or alter the ESN originally installed by the manufacturer in a cellular phone;
- (2) Transfer or other manipulation of the ESN originally installed by the manufacturer does not violate the Compatibility Specification or the Commission's Rules if such transfer or manipulation: (a) is authorized by the cellular subscriber; (b) does not affect the ESN circuitry; and (c) is not "readily" performed in the field;<sup>2</sup> and

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<sup>2</sup> Although some manufacturers use encrypted technology to perform ESN transfers to ensure that such transfers cannot be "readily" performed in the field and to protect against unauthorized transfers, others use methods which do not offer similar protections. See Ericsson Reply Comments, filed Nov. 5, 1992, at 4 (describing "encrypted data transfer device" used by Ericsson to protect against unauthorized ESN transfers). C2+ uses an encrypted technology very similar to that described by Ericsson. See C2+ Petition for Reconsideration at Exhibit 1, ¶¶3-8. In its Report and Order, the Commission erroneously cited Ericsson's Reply Comments as indicating that Ericsson opposed the transfer of ESNs through such encrypted technology. See Report and Order at ¶¶57, 60.

- (3) The Commission must reconsider and vacate its findings against C2+ in paragraph 62 of the Report and Order -- at least with respect to those ESN transfers performed by C2+ in the course of repairs or service upgrades.

II. Neither The Compatibility Specification Nor The Commission's Rules Support TIA's Attempt To Distinguish Between ESN "Removals Or Transfers" And "ESN Duplication."

TIA goes to great lengths to differentiate between its members and C2+ by explaining that its members do not "duplicate ESNs to allow more than one telephone to use an ESN at the same time." TIA Response at 3 (emphasis in original). However, even TIA cannot bring itself to declare that such ESN "duplication," when "performed with the authorization of the relevant subscriber" for the purpose of allowing the subscriber to make and pay for calls from an additional phone, violates the Compatibility Specification or the Commission's Rules. See Id. at ¶6 ("This duplication would seem inconsistent with Paragraph 2.3.2 of the Commission's Cellular System Mobile Station-Land Station Compatibility Specifications (OET-53) as enforced in prior Rule §22.915 and new Rule §22.933...regardless of prohibitions in §22.919 of the Rules." (emphasis added)).<sup>3</sup>

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<sup>3</sup> The Commission repeatedly has stated that Section 22.919 applies only to cellular phones initially type-accepted after January 1, 1995. See Report and Order at ¶62 ("the ESN rule will apply only to cellular equipment for which initial type-acceptance is sought after the date that our rules become effective"); Order, CC Docket No. 92-115, FCC 94-357 (rel. Jan. 10, 1995), at ¶13 ("The new ESN rule applies only to new equipment receiving type-acceptance after January 1, 1995.").

In fact, this apparent "inconsistency" is based on an interpretation of Section 2.3.2 which is neither required by its express terms nor essential to the basic purpose of the ESN as recognized by the Commission and by TIA. Moreover, if TIA's interpretation of Paragraph 2.3.2 applies at all, it applies only to manufacturers and does not prohibit subsequent ESN transfers to enable a legitimate cellular subscriber to make, receive and pay for, calls from either of two phones owned by the subscriber which emit the same ESN. In any event, there is no basis for TIA's speculation that a C2+ customer would use two phones with the same ESN "at the same time." C2+ gives its extension phone customers the same instruction provided by the carriers to customers of their "two phones/one number" services -- i.e. that they may use only one phone at a time because the service will not function properly otherwise.

A. There Is No Requirement That Two Mobile Units Used By The Same Subscriber Have Different ESNs.

TIA's assertion that ESN duplication "would seem inconsistent" with the Compatibility Specification is based on the self-serving interpretation of Paragraph 2.3.2 of the Compatibility Specification advanced by CTIA in this proceeding and apparently now adopted by TIA. Specifically, TIA interprets Paragraph 2.3.2 of the Compatibility Specification to require "that ESNs be 'uniquely assigned' to individual tele-

phones." TIA Response at ¶7. However, neither the language of that Paragraph nor the underlying purpose of the ESN mandates such a requirement, and the Commission in this proceeding apparently rejected a request from CTIA to clarify that the term "unique" as used in that Paragraph "means that one ESN will not occupy more than one mobile station." See CTIA Comments, filed Oct. 5, 1992, at ¶19; Report and Order at ¶56.

Contrary to TIA's assertion, Paragraph 2.3.2 of the Compatibility Specification does not require each mobile unit to have a different ESN. Rather, it defines the ESN as "a 32-bit binary number that uniquely identifies a mobile station to any cellular system." The Commission and TIA repeatedly have stated that the primary function of the ESN is to "identify mobile equipment to cellular systems...enabl[ing] the carriers to bill properly for calls made from the telephone." Report and Order at ¶54; see also TIA Motion for Stay, filed Dec. 19, 1994, at ¶4 ("Cellular telephone systems use ESNs to identify units for call-billing purposes. Even in the earliest days of cellular system design, it was recognized, therefore, that protecting ESN from alteration by unauthorized individuals, or from unauthorized transfers to phones not owned by an authorized user, was important to assure accurate call billing.") (emphasis added). Thus, the ESN must uniquely identify the mobile unit to "any cellular system" to ensure proper billing for calls made from that unit.

C2+ respectfully suggests that an "extension" phone programmed at the request of a bona fide cellular subscriber to emulate the ESN of that subscriber's primary phone "uniquely identifies" itself to the system so that all calls from that phone are "billed properly" to the subscriber.<sup>4</sup> Thus, the express language of Paragraph 2.3.2 -- and the basic purposes of the Compatibility Specification and the ESN -- do not support the self-serving interpretation advanced by TIA and CTIA.

Moreover, the Commission apparently rejected this interpretation when it failed to adopt CTIA's proposal to "clarify" that the "uniqueness" requirement of Paragraph 2.3.2 means that "any particular ESN will not exist in more than one mobile unit." Instead, the Commission adopted Rule §22.919(a) which applies only to phones initially type-accepted after January 1, 1995 and states only that each mobile unit "in service must have a unique ESN" (emphasis added). In this

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<sup>4</sup> Ironically, at the same time that they accuse C2+ of violating their own interpretation of the "uniqueness" requirement of Paragraph 2.3.2, the carriers are deploying competing "two phones/one number" services which undermine the most fundamental purpose of the Compatibility Specification, which is to ensure that "a mobile station can obtain service in any cellular system." Cellular Communications Systems, 86 F.C.C.2d 469, 578 (1981). The marketing materials used by the carriers to promote their "two phones/one number" services expressly state that "one phone must be designated as the primary phone, and only that phone can be used for roaming" and that "you cannot use your 'Secondary' phones to roam." See C2+ Petition for Reconsideration at Exhibit 2. Thus, the secondary "mobile station" used by subscribers to the carriers' "two phones/one number" services clearly cannot "obtain service in any cellular system."

respect, neither TIA nor CTIA has ever explained how either the subscriber or the cellular system is affected differently if the subscriber uses: (a) a replacement phone programmed by a TIA member to transmit the ESN of his primary phone in order to make and pay for calls while his primary phone is not in service because it is being repaired; or (b) a secondary phone (for example, a portable) programmed by C2+ to transmit the ESN of his primary phone (for example, a car-mounted unit) in order to make and pay for calls while his primary phone is not in service because it is turned off. In each case, the subscriber benefits through added convenience and cost savings without adversely affecting the cellular system.<sup>5</sup>

B. TIA's Interpretation Of Paragraph 2.3.2  
Would Apply, If At All, Only To Manu-  
facturers In Seeking Type Acceptance.

Even TIA's interpretation of Paragraph 2.3.2 would not invalidate the service offered by C2+. As the Commission previously has stated, compliance with the Compatibility

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<sup>5</sup> The Commission has concluded that use of a C2+ extension phone "could deprive cellular carriers of monthly per telephone revenues to which they are entitled." Report and Order at ¶60. However, as the Small Business Administration ("SBA") stated in its letter to Chairman Hundt in this proceeding, the carriers have no "unbridled right" under the Communications Act "to any specific amount of revenue for use of a public resource," and there is no legitimate reason "why cellular telephone companies deserve the right to all revenue" from "two phones/one number" or similar extension-type services "when the Commission is trying to increase competition in wireless service." See SBA Letter, attached as Exhibit 2 to MTC Communications' Replies to Opposition to Petitions for Reconsideration Filed by TIA and McCaw Cellular, filed Feb. 2, 1995, at 2-3.

Specifications "is regulated as part of the type-acceptance requirements on cellular transmitters." Cellular Communications Systems, 54 R.R.2d 375 (1983), at ¶1. The type-acceptance rules require "that manufacturers apply existing technical standards to such devices and obtain...type-acceptance ...prior to shipment or distribution of such devices for sale." Radio Frequency Devices, 23 F.C.C.2d 79 (1970), at ¶8 (emphasis added). Thus, TIA's interpretation would apply, if at all, only to manufacturers during the type acceptance process.<sup>6</sup>

However, subsequent transfer of the ESN does not void the type-acceptance, as evidenced by the ESN transfers performed by TIA members, provided that such transfers are not "readily" performed in the field, do not affect the ESN circuitry, and are performed with the customer's knowledge and consent to facilitate the billing function. See C2+ Petition for Reconsideration at 18-21. Thus, C2+ respectfully suggests that a legitimate cellular subscriber using the C2+ service to enable him to place, receive and pay for calls on a second phone which emulates the ESN of his primary phone is merely

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<sup>6</sup> It may be essential for manufacturers to ensure that each phone has a different ESN at the time of shipment because otherwise two different customers could receive phones with the same ESN, thereby undermining the primary billing function of the ESN. However, such concerns do not arise where a subscriber has purchased two phones and desires to have them programmed to emit the same ESN in order to ensure that he will be billed properly for calls made or received using either phone.

exercising the "right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." Hush-A-Phone Corp. v. U.S., 238 F.2d 266, 269 (D.C. Cir. 1956).

Paragraph 60 of the Report and Order also undermines TIA's argument that ESN duplication is "prohibited in the Compatibility Specifications and the Commission's Rules" (TIA Response at ¶7) and confirms that TIA's interpretation of Paragraph 2.3.2 applies only to manufacturers, if at all. There, the Commission clearly indicated that a subscriber's use of multiple phones with the same ESN would be allowed if the subscriber "receive[d] the permission of the relevant cellular licensee." Report and Order at ¶60. Obviously, a private party cannot grant waivers of the Commission's Rules to permit an otherwise prohibited activity. Although the Commission contends that the cellular carriers may grant or deny operating authority to mobile units under the "blanket license" issued to the carrier (Report and Order at ¶60), C2+ respectfully suggests that it is an abuse of discretion for the Commission to delegate the licensing function to a private party with a substantial vested financial interest in denying operating authority to other entities seeking to provide competitive services. See, e.g., C2+ Petition for Reconsideration at 17.



C. TIA's Speculation That C2+ Customers Will Use Multiple Phones With The Same ESN "At The Same Time" Is Unfounded

Although TIA claims that C2+'s activities will "allow more than one telephone to use an ESN at the same time" (TIA Response at ¶3), C2+ expressly informs its customers that they may use only one phone at a time. C2+ Petition for Reconsideration at 14 n.9 and Exhibit 1 at ¶10. The carriers offering competing "two phones/one number" services provide the same instruction to their customers. See Id. at Exhibit 2 (CellularOne FlexPhone Service -- "you decide which phone to receive calls on and simply turn the others "OFF"...The Flex-Phone feature will not function properly if both phones are 'ON';" BellSouth Mobility 2 Phones/1 Number Service -- "[o]nly one phone can be turned on at any one time. If both phones are left on, you may not be able to answer your incoming calls.")). In short, C2+ gives its customers the same instruction that the carriers give their customers. When those instructions are followed,<sup>7</sup> the subscriber has only one phone

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<sup>7</sup> Some carriers have argued that "notwithstanding C2+'s direction to users that multiple phones cannot be simultaneously operated, many subscribers in fact will have all phones turned on." See Comments of McCaw Cellular Communications, Inc. on Petitions for Reconsideration, filed Jan. 20, 1995, at 12-13. However, the carriers never explain why customers instructed by the carriers to use only one phone at a time will be able to follow those instructions but will be unable to follow the identical instructions when provided by C2+. In any event, the Commission has recognized that such problems "will be self-correcting" because a "user has no incentive to generate improper network control signals, as he will only decrease the utility of his own telephone service by doing so (e.g. fail to receive telephone calls, be unable to generate

"in service" at any given time -- and that phone will transmit an ESN which "uniquely identifies" it to the system so that all calls made from that phone will be "properly billed" to the subscriber. Thus, proper use of the C2+ service complies with any fair reading of the Compatibility Specification and the Commission's Rules.

III. The Commission Should Grant Expedited Reconsideration And Redirect Its Anti-Fraud Efforts

C2+ agrees with TIA that the Commission should "act expeditiously on the pending petitions for reconsideration, but firmly believes that the Commission must redirect its anti-fraud efforts if they are to be successful. Although new rule Section 22.919 may help with respect to phones initially type-accepted after January 1, 1995, the Commission has clearly stated that the rule does not apply to the 20 to 25 million existing cellular phones and to the ongoing manufacture of phones initially type-accepted prior to January 1, 1995. As TIA has stated, the focus of the Commission's anti-fraud efforts with respect to these phones has been to attempt "to limit to the greatest extent possible the individuals

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telephone calls, or reach wrong numbers)." Proposals for New or Revised Classes of Interstate and Foreign Message Toll Service (MTS) and Wide Area Telephone Service (WATS), 56 F.C.C.2d 593, 602 (1975), on recon., 58 F.C.C.2d 716 (1976), Second Report and Order, 58 F.C.C.2d 736 (1976), aff'd sub nom., North Carolina Util. Comm'n v. F.C.C., 522 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977).

having access to ESN-transferring software." TIA Response at ¶5.

However, the record in this proceeding clearly demonstrates that those efforts have failed. ESN-transferring software and devices already are widely available and become more widely available every day. Rather than pursuing a policy which seeks to "close the barn door after the horse already is out," the Commission should prohibit the use of such software or devices unless: (a) the user has registered with the carriers providing cellular service to the user's customers; (b) the user registers each customer and each phone with the appropriate carrier; and (c) the customer acknowledges in writing that he will use only one phone at a time. The Commission should authorize the carriers to terminate immediately and prosecute any unregistered service provider or customer. In short, registered, bona fide cellular subscribers who use phones with emulated or transferred ESNs to make calls which are properly billed and paid for are not the source of the carriers' fraud problems. Driving C2+ out of business through overly broad regulations will have no effect on the real fraud problem and will serve only to permit the carriers to continue to charge exorbitant rates for their "two phones/one number" services. See C2+ Reply to Comments of McCaw Cellular Communications, Inc., filed Feb. 2, 1995, at 9-10 and Appendix 1, Exhibit 4; MTC Communications' Replies To


Proposal By TIA and CTIA Relative to Field ESN Modifications,  
filed Apr. 3, 1995, at 5.

Conclusion

Neither the ESN transfers performed by TIA's members nor similar ESN transfers performed by C2+ during repairs and service upgrades violated the Act and the Commission's Rules. Because there is no reasonable basis to distinguish between those ESN transfers and the ESN emulations which C2+ performs only for legitimate cellular subscribers, the Commission must reconsider and vacate the adverse findings against C2+ in Paragraph 62 of the Report and Order.

May 3, 1995

Respectfully submitted,

  
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I hereby certify that a copy of the foregoing "Comments on Motion For Acceptance of Response" was served this 3rd day of May, 1995 by first-class mail, postage prepaid, upon the following:

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